IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1303

QANTAS AIRWAYS LIMITED,

Petitioner,

v.

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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This Reply is filed by Petitioner in response to the Memorandum for the United States as Amicus Curiae.

The Memorandum for the United States evidences either:

a misconception as to the question which Petitioner seeks to have the Court review on certiorari;

a misunderstanding of the nature of the "below cost" selling which is the subject of the preliminary injunction granted by the District Court;

a misconception as to the jurisdiction of the CAB to regulate all aspects of inclusive tours; or

a present desire by the Civil Aeronautics Board (CAB) to avoid exercising the jurisdiction and powers conferred upon it by the Federal Aviation Act.

Discussion

1. The question presented by the Petition is simply whether a district court should grant antitrust injunctive relief with respect to matters recognized to be within the initial jurisdiction of the CAB and which have been referred by the district court to the CAB for initial determination. The Memorandum for the United States fails to make mention of the fact that, since the filing of the Petition, the CAB has held an extensive evidentiary hearing[1] with respect to the very matter which is the subject of the preliminary injunction granted by the District Court, namely "below cost" selling. This hearing was held from May 17 to May 26, 1976 and it is surprising to Petitioner that no mention of this is made in the Memorandum of the United States since the CAB has apparently contributed substantially to the Memorandum.

If the CAB determines as a result of that evidentiary hearing that Qantas has not, in fact, sold its inclusive tours "below cost" and that an airline is not required, in the public interest, to allocate normal airline administrative and overhead expenses to the land portion of inclusive tours, there will be a direct conflict between the holding of the District Court and the CAB on an air transportation economic policy matter. It is this type of collision between judicial and administrative regimes which

[1] Pursuant to a Petition for Enforcement which is set forth in full in the Appendix to the Petition, pages 94a-97a. The Third Party Complaint pursuant to which the Petition for Enforcement was filed is set forth in the Appendix to the Petition at pages 74a-93a.

the Court has indicated should be avoided by deferring to the administrative agency those matters clearly within the experience and expertise of the agency. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963); *Far East Conference* v. *United States*, 342 U.S. 570 (1952). See also, *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963).

The underlying objective of this doctrine of primary jurisdiction is to insure uniformity and consistency in the regulation of the industry entrusted to the particular agency. *Far East Conference* v. *United States*, 342 U.S. 570, 574 (1952). The objective of uniformity and consistency in the regulation of the air transportation industry will not be achieved if it is left to district judges, of whom there are over 500, to determine *what* airline overhead and administrative expenses should be allocated to the land portion of inclusive tours, *if any*, and *to what extent*. This is one of the basic questions which will be decided by the CAB as a result of the evidentiary hearing recently concluded. The fact that the District Court has provisionally vacated the preliminary injunction, after directing that Qantas increase its prices to a level satisfactory to the District Court, is irrelevant to the question of whether the District Court should have exercised its antitrust jurisdiction to determine matters recognized as being within the initial jurisdiction of the CAB before the CAB had been given an opportunity to act.

The Court in *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966) recognized the principles of the *Far East* and *Cunard* cases (cited in the Petition but ignored by the United States in its Memorandum) that district courts should not issue injunctions with respect to

conduct which an administrative agency *can* and *may* subsequently approve.

2. The Memorandum for the United States, while repeatedly referring to "below cost" selling, as determined by the District Court in granting the preliminary injunction, does not at any time describe the "costs" with which the District Court was concerned.

The preliminary injunction is clear that the costs involved are airline "administration expenses, office expenses, salaries, general in-house expenses and, possibly advertising and brochure costs" related to the land portion of the inclusive tours involved (Pet. App. 51a). The "costs" involved do not relate to the actual charges to Qantas for the land services included in the inclusive tour package. One of the issues litigated in the hearing before the CAB in May, 1976 was the basic policy question whether airline administrative and overhead expenses should, in the public interest, be allocated to the direct land costs of the inclusive tour, *i.e.*, the costs charged to Qantas by the suppliers of the land components. If it is determined by the CAB that airline administrative and overhead expenses should be so allocated, the further question to be decided by the CAB is—to what extent?

The District Court already has ruled, in granting the preliminary injunction and subsequently provisionally vacating the preliminary injunction, that airline administrative and overhead expenses should be included in the tour price to the public, not to benefit the public but to protect independent tour operators such as Foremost. The District Court has also determined the extent of the mark-up that should be included in the tour price to the public to cover such expenses. The objective of uniformity and consistency in the regulation of the air transportation in-

dustry, which has been entrusted to the CAB by Congress, will not be achieved if it is left to individual district courts to determine these matters.

Section 102 of the Act directs the CAB, in exercising and performing its powers and duties, to consider, as being in the public interest, the following, among other things:

> "(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
>
> • • • • •
>
> (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the United States Postal Service, and of the national defense." 49 U.S.C. 1302(b), (d).

In deciding whether to exercise its recently granted suspension power with respect to rates, fares, charges or practices affecting same, the CAB has been directed by Congress to take into consideration, among other factors:

> "(B) the need in the public interest of adequate and efficient transportation of persons and property by air carriers and foreign air carriers at the lowest cost consistent with the furnishing of such service;
>
> • • • • •
>
> (E) the need of such air carrier and foreign air carrier for revenue sufficient to enable such air carrier and foreign air carrier, under honest, economical, and

efficient management, to provide adequate and efficient air carrier and foreign air carrier service; and

(F) whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation. 49 U.S.C. 1482(j)(5)(B), (E) and (F).

The determination of questions of economic policy, such as the elements of cost to be included in the price of an inclusive air tour package, lies at the very heart of the CAB's mandate from Congress to regulate, in the public interest, the economics of the air transportation industry. As recognized in the Memorandum for the United States, an inclusive tour air fare cannot be sold without the minimum land component package required by the CAB and approved tariffs. The CAB has been heavily involved in the establishment of promotional or discount air fares and in approving a fare structure which includes promotional and discount air fares, the CAB has determined the airline cost factors which must be met by the fare. See, Domestic Passenger Fare Investigation (DPFI)—Phase 5, *Discount Fares*, Order 72-12-18 (1972).

Clearly, the question of whether normal airline administrative and overhead expenses should be allocated to the direct costs of the land portion of an inclusive air tour involves "the validity of a rate or practice" included in the tariffs of Qantas filed with the CAB, involves "technical questions of fact uniquely within the expertise and experience" of the CAB, involves "an assessment of industry conditions" and is a question with respect to which considerations of uniformity and consistency in regulation require reference to the CAB prior to the granting of any antitrust injunctive relief. See, *Nader* v. *Allegheny Airlines, Inc.*, —— U.S. ——, 48 L. Ed. 2d 643 (1976).

The Memorandum for the United States finds it "a reasonable and desirable accommodation of the interests involved" for the District Court to have granted a preliminary injunction to protect Foremost as a competitor in the inclusive tour business while the CAB deals with the identical issues. (Mem. 11). The paradox created by this unprecedented approach is emphasized by the recognition of the District Court that "any portions of the preliminary injunction . . . jointly acted upon" will be terminated by the District Court! 379 F. Supp. 88 at 96, fn. 7. (Pet. App. 46a-47a). In the interim, however, and while CAB action is awaited, the industry is placed in a state of uncertainty, the objectives of uniformity and consistency in the regulation of this economic aspect of the industry are thwarted and, in the event the CAB finds contrary to the District Court, Qantas will have been irreparably prejudiced.

The Act requires the CAB to protect the public interest, and not the private interests of any individual, person or company. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79 (1956). It is again surprising to Petitioner that the CAB is not seeking to protect and preserve its own jurisdiction, duty and responsibility to decide as a matter of policy the very questions dealt with by the District Court in the granting of the preliminary injunction. The interests dealt with in the District Court do not include the public interest in having available transportation "at the lowest cost consistent with the furnishing of such service", an interest which Congress has directed the CAB to consider and protect in regulating the air transportation industry. 49 U.S.C. 1482(j)(5)(B).

3. The CAB does have the power to regulate all aspects of the inclusive tour industry and the fact that the CAB evidently does not wish to exercise the full extent of its

powers is irrelevant in determining whether the District Court properly granted preliminary antitrust relief pending CAB action on the identical subject matter. Contrary to the representations contained in the Memorandum for the United States, the CAB *has* undertaken to regulate the manner by which inclusive air tours are advertised and sold and has not limited its regulatory function in this area to "tariff-related" matters. In *Trans World Airlines, Inc., Flying Mercury, Inc.* Enforcement Proceeding, CAB Docket 24697, Order 73-6-9 (1973), the CAB, acting pursuant to Section 411 of the Act,[2] ordered TWA and Flying Mercury to cease and desist from:

> "engaging in unfair or deceptive practices and unfair methods of competition within the meaning of section 411 of the Act by offering, selling and operating GIT's in air transportation, under terms, conditions, and restrictions that do not conform to those in its promotional materials and which are such as to make required sleeping accommodations not reasonably available to the average participant." Order 73-6-9, p. 7.

The action of the CAB in dealing with the "throwaway" program in the *TWA-Flying Mercury* case is directly contrary to the representation in the Memorandum for the United States in footnote 4 at page 3 as to how the CAB would undertake to deal with such a matter. As Order 73-6-9 clearly indicates, the disapproval by the CAB of the throwaway program was not based upon a determination that the "air fare was too low in light of the conditions on its availability" but rather was based upon a determination that TWA and Flying Mercury were not using the promotional inclusive tour air fare as envisaged by the CAB when it was approved.

[2] 49 USC 1381.

4. The Memorandum for the United States argues that any similarity between this case and *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973) "is more apparent than real." (Mem. 10). The position seems to be that no antitrust immunity attaches under Section 414 of the Act[3] to CAB approval of minimum land component prices because the CAB "did not analyze in any detail the land services to be offered by Qantas but considered them only to the extent necessary to assure that the conditions for availability of the tour-basing air fare had been met." (Mem. 10).

No authority is cited in support of this position or for the proposition that each Order approved by the CAB pursuant to Section 412 of the Act[4] must be scrutinized with specificity by the CAB before antitrust immunity attaches under Section 414 of the Act. The cases which have been decided post *Hughes* have imposed no such condition on the conferring of Section 414 immunity. *Grueninger International Travel, Inc.* v. *Air Transport Association of America*, 405 F.Supp. 1241 (D.D.C. 1976); *Lowe* v. *International Air Transport Association*, 13 CCH Av.L.Rep. 18,214 (S.D.N.Y. 1976); *Scroggins* v. *Air Cargo Inc.*, 13 CCH Av.L.Rep. 17,469 (N.D. Ga. 1974); *Beltz Travel Service, Inc.* v. *Air Transport Association of America*, 13 CCH Av.L.Rep. 17,242 (N.D. Cal. 1974).

In *Grueninger*, the plaintiff argued that *Hughes* was distinguishable because the CAB in *Hughes* had scrutinized virtually every business transaction between Hughes and TWA. The court rejected this rationale and held that so long as the CAB had supervised the activities in controversy, immunity from the antitrust laws will be afforded.

[3] 49 USC 1384.

[4] 49 USC 1382.

405 F.Supp. at 1243. The *Scroggins* court dismissed the complaint of plaintiff where a number of airlines had agreed to have one air cargo carrier act as agents for all airlines at one airport. The Agreement had been approved by the CAB under Section 412 of the Act and the court rejected plaintiff's contention that antitrust immunity was not conferred under Section 414, holding:

> "Such an argument does not stand up against the holding in Hughes. There the Court made it clear that immunity under Section 414 does not depend upon explicit approval of the conduct complained of." 13 CCH Av.L.Rep. at 17,471.

The Memorandum of the United States does not dispute the fact that the prices of the inclusive tours of Qantas at issue in this proceeding complied with currently effective tariffs filed with the CAB. These tariffs were filed in implementation of an agreement of the International Air Transport Association (IATA) which had been filed with and approved by the CAB under Section 412 of the Act. This CAB approved IATA agreement set forth the tour basing fare to be charged by Qantas as well as the minimum price for the required land arrangements. (Mem. 5).

Hughes does not require explicit approval of the conduct complained of before Section 414 antitrust immunity applies. Section 414 of the Act confers antitrust immunity to any person affected by an Order of the CAB approving an agreement filed under Section 412 of the Act. To argue that the statutory immunity does not apply unless the CAB has sufficiently scrutinized the agreement it has approved is to read into Section 414 of the Act a condition which is simply not warranted and which has not to date found judicial acceptance. It would be difficult for anyone such as Petitioner to devise a proceeding through which a determination could be made as to whether the CAB had sufficiently scrutinized the agreement approved before acting pursuant to it.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this 13th day of September, 1976 served the foregoing reply to the Memorandum for the United States upon respondent and the United States, *amicus curiae*, by depositing same in a United States mail box at 1251 Avenue of the Americas, New York, New York 10020, with first class postage prepaid, addressed as follows:

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